Supreme Court, U.S.
FILED
APR 11 1994
OFFICE OF THE CLERK

No. 93-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM F. GLOVER,
Petitioner,

v.

McDONNELL DOUGLAS CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS C. WALSH
(Counsel of Record)
MICHAEL P. BURKE
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, Missouri 63102-2750
(314) 259-2000

Attorneys for Respondent

BRYAN CAVE
Of Counsel

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of the Case	1
Introduction	1
The Court of Appeals' Opinion	3
REASONS WHY THE WRIT SHOULD BE DENIED	4
I. THE COURT OF APPEALS ANALYZED THE SUFFICIENCY OF EVIDENCE OF "WILLFULNESS" UNDER THE STANDARD OF HAZEN PAPER CO. v. BIGGINS	4
II. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE PROPER WILLFULNESS STANDARD	5
CONCLUSION	7

TABLE OF AUTHORITIES

Page

Cases

Baker v. Delta Airlines, 6 F.3d 632 (9th Cir. 1993)..... 6

Brown v. Stites Concrete, Inc., 994 F.2d 553 (8th Cir. 1993)..... 6

Hazen Paper Co. v. Biggins, 113 S.Ct. 1701 (1993).....*passim*

Purcell v. Sequin State Bank and Trust Co., 999 F.2d 950 (5th Cir. 1993) 6

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) .....*passim*

No. 93-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM F. GLOVER,
Petitioner,

v.

McDONNELL DOUGLAS CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Introduction

At the beginning of this Term, petitioner asked this Court to summarily vacate the first Eighth Circuit opinion in this case and remand so that the Court of Appeals could take a "fresh look at the evidence" in light of *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993), which had been handed down subsequent to the Eighth Circuit's ruling. This Court granted the request, and the Eighth Circuit has re-analyzed the evidence as required. But petitioner is still not satisfied and now seeks *plenary* review of the fact-specific "willfulness" determination made by the Court of Appeals after its second analysis of the record. Petitioner has

had more than his fair share of appellate review, and his most recent petition should be denied.

Petitioner's Statement of the Case is misleading in several important respects and lacks proper citations to the record. Most of petitioner's factual misstatements relate to his job performance with McDonnell. Contrary to his assertions, petitioner's performance cannot be described as "competent" or "positive" (Pet. 3). Petitioner never earned a promotion during his 21-year career with McDonnell (Tr. 1:91, 100; 3:60). Although he had a college degree, petitioner was still working in an entry-level clerical position at the time of his layoff (Tr. 1:94), and he had not received a merit wage increase in more than three years (Tr. 1:60). The written indicia of plaintiff's performance were equally negative. His performance appraisals were poor (Apdx. 64-69), and he was ranked dead last among the 42 salaried accounting department employees in the 1987 totem pole, which was an evaluation technique used at McDonnell for purposes of ranking employees by who made the greater (and lesser) contributions to the work of the department (Tr. 2:70-72, 100; Deft. Ex. C).

Petitioner also mischaracterizes the role of the Review Committee in the layoff process. The Review Committee, composed of Human Resources and Law Department representatives, was formed to provide another level of review to ensure that those employees selected for layoff had been appropriately selected on a "pure business basis and ...not in violation of any company policy or law" (Tr.2:39). There is no basis in the record for petitioner's assertion that the Review Committee's role was "perfunctory" or a "rubber stamp" (Pet.8 n. 1). Instead, the Review Committee met twice with the department head, first to review the appropriate, age-neutral factors to be considered in making layoff selections and later to review information regarding individual employees on the layoff list (including petitioner) (Tr. 2:131-36).

The Court of Appeals' Opinion

On remand from this Court, the Eighth Circuit made a second analysis of the record and, in an opinion by Senior Circuit Judge Floyd R. Gibson, adhered to its previous ruling that petitioner had made a barely submissible case on liability under the ADEA to support the jury's award of backpay. The court also repeated its reversal of the awards of emotional distress damages and punitive damages under Missouri law due to insufficiency of the evidence. It likewise vacated again the award of pension credit and remanded that issue to the trial court.

With regard with the "willfulness" issue, the court explicitly analyzed the evidence under the standard required by *Hazen Paper*. Following its analysis, the court came to the same conclusion as it had in petitioner's first appeal when it applied the principles set out in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985):

> "We continue to believe that '[t]here is simply no evidence that McDonnell Douglas recklessly disregarded the possibility of an ADEA violation, and there is no contention that the company knew its actions were discriminatory' [citation omitted]. Therefore, there was insufficient evidence to sustain the jury's determination that the violation was willful, and liquidated damages should not be awarded" (Pet. Apdx. A-6).

A petition for rehearing and a suggestion for rehearing en banc were denied.[1]

---

[1] Pursuant to Sup. Ct. Rule 29.1, respondent states that it has no parent corporation. It has only one subsidiary that is not wholly-owned: Finnair American Trade, Inc., of which the minority shareholder, Finnair OY, owns 20%.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner's petition represents his sixth attempt to persuade an appellate court that he is entitled to liquidated damages. On a full review of the record, the Court of Appeals has now twice reversed the jury's finding of a willful violation of the ADEA under the standard set out in *Thurston* and reaffirmed in *Hazen Paper*. The Eighth Circuit has likewise twice refused to rehear the "willfulness" issue en banc. There is nothing about this case deserving of this Court's attention, and it is now time to close the book on this litigation, more than six years after petitioner's layoff.

I. THE COURT OF APPEALS ANALYZED THE SUFFICIENCY OF EVIDENCE OF "WILLFULNESS" UNDER THE STANDARD OF HAZEN PAPER CO. V. BIGGINS.

The Court of Appeals properly analyzed the sufficiency of the evidence of "willfulness" under the standard recently reaffirmed in *Hazen Paper*. That test — whether "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute" — was the same one applied by the Court of Appeals when it first reversed the award of liquidated damages under *Thurston*. *Hazen Paper*, 113 S. Ct. at 1710. The Eighth Circuit found that the evidence in the record was insufficient to support a finding of "willfulness" under *Thurston* and *Hazen Paper*:

> "It is contended that, because Barbeau had been briefed about the basic requirements and prohibitions of the ADEA, and because Barbeau had been found to violate the ADEA, he must have committed his violation recklessly. However, *Thurston* itself rejected this argument when it declined to hold 'that a violation of the Act is "willful" if the employer simply knew of the potential applicability of the ADEA'" (Pet. Apdx. A-6, A-7).

Thus, the Court of Appeals did no more than recognize that ADEA liability and willfulness are legally and definitionally distinct under the *Hazen Paper* standard and that the two-tiered liability scheme under the ADEA simply means the evidence in a willful case must prove more than the evidence in a non-willful case — "there will necessarily be differences between the evidence in a non-willful case and the evidence in a willful case" (Pet. Apdx. A-7). In recognizing the differences between ADEA liability and willfulness, the Eighth Circuit's ruling was consistent with the ADEA's two-tiered liability scheme which was reaffirmed in *Hazen Paper*: "[W]e continue to believe that the 'knowledge or reckless disregard' standard will create two tiers of liability across the range of ADEA cases." 113 S. Ct. at 1709.

Petitioner's real objective is the complete eradication of the two-tiered liability scheme endorsed in *Hazen Paper* and the automatic doubling of damages for any ADEA violation. The petition contains several clues which unmask this objective. Petitioner says that "an almost automatic award of liquidated damages" should follow a finding of ADEA violation (Pet. 10), and that an award of liquidated damages should result "in most cases" of ADEA liability (Pet. 13). This approach is contrary to the statutory language of the ADEA and Supreme Court precedent through 1993.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE PROPER WILLFULNESS STANDARD.

Petitioner's attempt to identify a conflict among the circuits regarding the application of the willfulness standard set out in *Hazen Paper* is wholly artificial. The few cases cited by petitioner pre-date *Hazen Paper* and cannot be used to create a conflict which does not currently exist.[2] Indeed, in his first

[2] Interestingly, the federal appellate cases cited by petitioner, while not evidencing a current conflict among the circuits, clearly embrace the two-tiered liability scheme mandated by this Court which petitioner seeks to dismantle.

Petition for Certiorari, petitioner argued that the recent en banc decision of the Eighth Circuit in *Brown v. Stites Concrete, Inc.*, 994 F.2d 553 (8th Cir. 1993), had adopted the very position advocated here by petitioner by properly rejecting the higher standards of proof of "willfulness" which developed in certain circuits following *Thurston*. Petitioner obviously does not now argue that *Brown* is in conflict with decisions in any other circuits, and the same en banc Eighth Circuit, which petitioner applauded for its *Brown* decision, clearly felt that *Brown* was not in conflict with this case when it rejected petitioner's rehearing request.

The various courts of appeals have consistently applied the willfulness standard mandated by this Court in *Hazen Paper* only last year. In doing so, they have reaffirmed the same two-tiered liability scheme under the ADEA which petitioner attacks in this case. *See, e.g., Purcell v. Sequin State Bank and Trust Co.*, 999 F.2d 950 (5th Cir. 1993); *Baker v. Delta Airlines*, 6 F.3d 632 (9th Cir. 1993). There is simply no conflict among the circuits on the "willfulness" issue. This Court has announced the rule applicable to that issue in *Hazen Paper*, and it was properly applied to the facts of this case.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

THOMAS C. WALSH
(Counsel of Record)
MICHAEL P. BURKE
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, Missouri 63102-2750
314-259-2000

Attorneys for Respondent

BRYAN CAVE
Of Counsel

April 1994